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BEFORE THE ARIZONA CORPORATION C

AZ CORP COMMISSION
DOCKET CONTROL

COMMISSIONERS

TOM FORESE – Chairman
BOB BURNS
ANDY TOBIN
BOYD DUNN
JUSTIN OLSON

2018 AUG 28 PM 1:40

IN THE MATTER OF THE COMMISSION'S
INVESTIGATION OF THE BILLING AND
WATER QUALITY ISSUES OF JOHNSON
UTILITIES, LLC.

DOCKET NO. WS-02987A-18-0050

**NOTICE OF FILING
GRANT OF PRELIMINARY INJUNCTION**

The Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission")
hereby provides Notice of Filing Grant of Preliminary Injunction from Pinal County Superior Court.

RESPECTFULLY SUBMITTED this 28th day of August, 2018.

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Arizona Corporation Commission

DOCKETED

AUG 28 2018

DOCKETED BY

CERTIFICATE OF SERVICE

On this 28th day of August, 2018, the foregoing document was filed with Docket Control as an Utilities Division Notice of Filing - Miscellaneous, and copies of the foregoing were mailed on behalf of the Utilities Division to the following who have not consented to email service. On this date or as soon as possible thereafter, the Commission's eDocket program will automatically email a link to the foregoing to the following who have consented to email service.

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ATTACHMENT A

IN THE SUPERIOR COURT

2018 AUG 28 PM 4:06

PINAL COUNTY, STATE OF ARIZONA

BY ARM
DEPUTY

Date: 08/28/2018

THE HON STEPHEN F MCCARVILLE,

By Judicial Administrative Assistant: Rebecca Padilla

ARIZONA CORPORATION COMMISSION

Plaintiff(s),

vs.

JOHNSON UTILITIES, LLC

Defendant(s),

S1100CV201801302

**RULING RE: PRELIMINARY
INJUNCTION**

INTRODUCTION

The Court had taken this matter under advisement after the hearing held on August 23, 2018, regarding Plaintiff's Request For a Temporary Restraining Order pursuant to Rule 65(d) of the Arizona Rules of Civil Procedure. As this court noted at the commencement of that hearing, this court's authority was limited, and, the only issue pending before the court on August 23, was very narrow: had the interim manager been appointed; and, had the interim manager assumed management of Johnson Utilities. The Court informed the parties that the issues regarding the authority of the Arizona Corporation Commission to issue Decision Number 76785; whether that decision was supported by the evidence; and, whether EPCOR is qualified to serve as the interim manager are all issues for appellate review, not this court.

Further, the parties were informed that until and unless a stay had been granted by an appellate court, the prosecution or enforcement of that decision (from the Arizona Corporation Commission) would go forward. For those reasons, this court also informed the parties that it would not allow them to re-litigate the case that had been presented before the commission.

FACTUAL BACKGROUND

The facts that are relevant to the issue before this court are set out in the Commission's Verified Complaint and the accompanying Decision No. 76785 attached to the Commission's Verified Complaint as Exhibit B. Johnson Utilities ("JU") is an Arizona

limited liability company and public service corporation and a Class A utility that provides water and wastewater utility services in Pinal County, Arizona pursuant to Certificates of Convenience and Necessity ("CC&Ns") granted by the Arizona Corporation Commission ("ACC") in Decision No. 60223.

On March 8, 2018, staff at the ACC filed an Open Meeting Memorandum, enumerating its findings on Johnson's history of and ongoing regulatory compliance issues. At the Open Meeting on March 13, 2018, the Commission ordered Staff to file an Application for an Order to Show Cause ("Application for OSC") as to why an interim manager should not be appointed. The evidentiary hearing commenced on April 16, 2018.

On July 12, 2018, Administrative Law Judge Sarah Harpring issued a Recommended Opinion and Order, that based on the evidence presented during the evidentiary hearing, an interim manager should be appointed immediately for Johnson Utilities. (emphasis added). The Commission, on July 24, 2018 issued the Decision, authorizing the appointment of an interim manager for Johnson Utilities. That Decision (No. 76785), orders the immediate appointment of an interim manager for Johnson Utilities. The Decision found as follows:

- 1) Johnson's service, equipment and facilities threaten the safety, health, comfort and convenience of its patrons, employees, and the public, and are not in all respects adequate, efficient and reasonable as required by A.R.S. § 40-361(B);
- 2) Johnson has not safely conducted and handled sewage from the customer's point of collection as required by Arizona Administrative Code (A.A.C.) R14-2-607(A);
- 3) Johnson has not made reasonable efforts to supply a satisfactory and continuous level of service as required by A.A.C. R14-2-607(C);
- 4) Johnson's service and equipment is not, in all respects, just, reasonable, safe proper adequate and sufficient; and
- 5) Johnson has demonstrated that it lacks the ability to financially operate the utility.

DISCUSSION

As plaintiffs correctly argued, a preliminary injunction or a temporary restraining order is appropriate if the following four factors are met: 1) likelihood of success on the merits; 2) the possibility of irreparable injury to the moving party that is not remediable by

damages if the requested relief is not granted; 3) a balance of hardships favors the moving party; and 4) public policy favors the injunction. *P & P Mehta LLC v. Jones*, 211 Ariz. 505, 507, 123 P.3d 1142, 1144 (App. 2005) (citing *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990)). Each of those factors are established by the 5 findings from the Commission's Decision No. 76785, set forth above.

The request for the Preliminary Injunction was brought under A.R.S. § 40-422, which provides that if the Commission believes "a public service corporation is failing or about to fail to do anything required by law or an order or requirement of the commission... it shall commence a proceeding in the name of the state to have such violations or threatened violations prevented, whether by mandamus or injunction." The authority of the Arizona Corporation Commission to enjoin a company from conducting a business which they regulate was confirmed in *State ex. rel Corbin v. Goodrich*, 151 Ariz. 118, 726 P.2d 215 (Ariz. App, Div 2 1986).

It has now been over one month since the Decision was adopted by the Arizona Corporation Commission on July 24, 2018. Then as now, Johnson's operations of its water company are not safe, reliable or adequate. Johnson lacks the ability to financially manage the utility. And yet, the Decision's mandate to appoint an Interim Manager immediately, has not been fulfilled. The Court therefore FINDS that irreparable injury will occur if the request is denied.

NOW THEREFORE, IT IS HEREBY ORDERED that the Request For Preliminary Injunction/Temporary Restraining Order is **GRANTED**.

IT IS FURTHER ORDERED that Johnson Utilities shall provide EPCOR with full and exclusive access to and control over all revenues paid by customers of Johnson for utility service, or by third parties as contributions or advances in aid of construction or otherwise, whether such revenues are currently paid into a financial institution account controlled by Johnson or a Johnson Affiliate (including but not limited to Hunt Mgt. L.L.C. and Ultra Management, L.L.C.) no later than Thursday, August 30, 2018, by 2:00 p.m. Should any employee, agent, officer or principal of Johnson Utilities attempt to prevent EPCOR with access, they shall be subject to arrest for interference with a judicial proceeding.

IT IS FURTHER ORDERED that Johnson Utilities shall provide EPCOR with a complete list of all financial institutions, including account numbers and branches, in which any revenues paid by customers of Johnson for utility service, or by third parties as contributions or advances in aid of construction or otherwise, whether such revenues were or are currently paid into a financial institution account controlled by Johnson or a Johnson Affiliate (including but not limited to Hunt Mgt. L.L.C. and Ultra Management, L.L.C.) were deposited for the last 3 years, no later than Thursday, August 30, 2018, by 2:00 p.m. Should any employee, agent, officer or principal of Johnson Utilities fail to provide said

information to EPCOR, they shall be subject to contempt for interference with a judicial proceeding.

IT IS FURTHER ORDERED that Johnson Utilities shall allow EPCOR exclusive access to any facilities, records, accounts and materials owned by Johnson Utilities that EPCOR determines, in its sole discretion, it needs access in order to successfully operate Johnson Utilities and abide by the mandates of ACC Decision 76785, no later than Thursday, August 30, 2018, by 2:00 p.m. Should any employee, agent, officer or principal of Johnson Utilities attempt to prevent EPCOR with access, they shall be subject to arrest for interference with a judicial proceeding.

IT IS FURTHER ORDERED that Johnson Utilities shall allow EPCOR, as Interim Manager, to perform a comprehensive assessment of the existing Johnson infrastructure, including its water supply and wastewater treatment capacity, to allow EPCOR to make a recommendation to the ACC Staff for approval as to whether, and how many, new service connections can be added. Said comprehensive assessment shall begin on Thursday, August 30, 2018.

BOND

Johnson Utilities argued at the hearing held on August 23, 2018, that EPCOR should be required to post a bond before assuming any management control over Johnson Utilities. However, that misstates either the facts or law of this case. EPCOR is not the party in this action. The real party is the Arizona Corporation Commission. Under Rule 65(c) of the Arizona Rules of Civil Procedure:

(1) *Generally; On Issuance.* The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in such amount as the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The State of Arizona and its agencies, counties, municipalities, and other governmental entities--and their respective officers--are not required to give security.

Accordingly, IT IS FURTHER ORDERED that pursuant to Rule 65(c)(1) of the Arizona Rules of Civil Procedure, the Plaintiff shall not be required to post any bond.

MISCELLANEOUS PROVISIONS

Johnson Utilities raised 2 issues in its closing summation which should be addressed by the Court but do not require an immediate resolution, nor should those issues delay the issuance of the injunction. Those issues were: payment of attorney fees and expenses incurred in ongoing litigation; and, whether EPCOR could require Johnson Utilities to grant a lien over its property. Each of those issues is addressed below.

Ongoing Litigation/Attorney Fees

Johnson Utilities raised a valid concern regarding its ability to both prosecute and defend itself in ongoing litigation. This court was provided with one such case. *Lara v. Johnson Utilities*, Pinal County Cause No. CV201800146. [Exhibit 2, tab 32]. The Court recognizes that JU's ability to do so requires a process to submit invoices for attorney fees without having to disclose the theory of their case, potential experts, or, waive the attorney-client privilege. Redaction of that information may not be feasible. However, EPCOR has the responsibility to ensure that only those fees incurred for the benefit or protection of JU are paid. Accordingly, EPCOR and Johnson Utilities shall confer and notify this court no later than Friday, September 7, 2018, whether:

- (1) They have mutually agreed upon a procedure to submit, review and process all requests for attorney fees for payment; or,
- (2) All requests for attorney fees shall be submitted under seal to the court for review and approval of reasonable attorney fees. The Court shall issue a ruling regarding the fees to be paid without disclosing the invoices; or,
- (3) A Special Master shall be appointed to review and approve reasonable attorney fees. The Special Master shall notify EPCOR each month regarding the fees to be paid without disclosing the invoices. If the parties cannot agree on a Special Master, Johnson Utilities and EPCOR shall nominate 2 individuals and/or law firms to serve as Special Master in a "Notice of Nominees for Appointment as Special Master" to the Court without specifying which entity made the nomination. However, the nominee's qualifications and rates for service shall be summarized in that Notice.

Liens on Johnson Utility Assets

This decision will not enter any order or ruling at this time regarding EPCOR's request to require Johnson Utilities to grant a lien on its assets. Specifically, the document entitled "JOHNSON UTILITIES, LLC ACKNOWLEDGMENT AND CONSENT" [Exhibit 1, tab 18] provides:

6. EPCOR has the right, at its option, under the Agreement and as the Interim Manager, to place a blanket lien on all of Johnson's assets to secure any amounts owing to EPCOR as Interim Manager by Johnson, including any amounts owing as a result of Johnson's indemnity obligations under Commission Decision No. 76785. If determined to be necessary by EPCOR's outside legal counsel, Johnson will execute any

and all agreements and documents necessary to create and perfect that security interest.

However, paragraph 1.5 entitled "No Obligation To Infuse Capital" and paragraph 1.7* (there are 2 paragraphs numbered 1.7) entitled "Additional Services" in the agreement between the Arizona Corporation Commission and EPCOR [Exhibit 1, tab 16, "AGREEMENT FOR INTERIM MANAGEMENT SERVICES"] do not require EPCOR to incur any expenses in the management of Johnson Utilities or to make any capital improvements. Further, there has been no determination that the revenues generated by Johnson Utilities are insufficient to pay all the ongoing expenses; needed capital improvements and/or EPCOR's management fees. Accordingly, that request is deferred at this time but may be re-urged by EPCOR.

IT IS FURTHER ORDERED that this matter shall be set for a review hearing on Monday, September 10, 2018 at 9:00 a.m., before the Honorable Stephen F. McCarville, to review compliance with the above. Each party shall be allocated 30 minutes for that hearing.

DONE THIS 28th day of August 2018.



HONORABLE STEPHEN F. MCCARVILLE
JUDGE OF THE SUPERIOR COURT

Mailed/distributed copy: 08/28/2018

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